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That the Waters Shall be Forever Free: Navigating Wisconsin's Obligations Under the Public Trust Doctrine and the Great Lakes Compact

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THAT THE WATERS SHALL BE FOREVER FREE: NAVIGATING WISCONSIN'S OBLIGATIONS UNDER THE PUBLIC TRUST DOCTRINE AND THE GREAT LAKES COMPACT

The implementation of the Great Lakes Compact stands to be a true "watershed" event in the protection of water resources in and around the Great Lakes. Nowhere is the administration of the Compact and its narrow exceptions more relevant now than in Wisconsin, where the city of Waukesha is preparing to submit the first request for an out-of-basin diversion under the Compact. The contentiousness of Waukesha's diversion request is amplified by Wisconsin's long tradition of strong natural resource protections, particularly by the operation of the public trust doctrine. That doctrine has been liberally construed, and extends protections to the public's right to use waters of the state for numerous purposes, including navigation, recreation, fishing, and even for the enjoyment of natural beauty.

Given the broad scope of the public trust, however, officials and residents of water-poor Waukesha could assert that the doctrine guarantees access to the waters of the state for the purpose of securing safe drinking water. If the public trust doctrine is construed to ensure access for drinking water, then, under the Compact, a denial of a diversion for Waukesha would be in derogation of those state-based water rights; the Compact, however, explicitly disavows any such interference with state water rights. Thus, as the Wisconsin Department of Natural Resources prepares to address Waukesha's pending application and Wisconsin courts continue to define the scope of the public trust, interested parties await resolution of this potential conflict, which stands to address whether, and how, Wisconsin's waters will remain "forever free."

I. INTRODUCTION

The state of Wisconsin, bordered by two Great Lakes and containing over 15,000 inland lakes[1] and over 12,000 rivers,[2] is dripping with water resources. These vast resources provide significant social, economic, and even moral incentives to maintain the health and integrity of the

1. WIS. DEP'T OF NATURAL RES., WISCONSIN LAKES 11, 17 (2009), *available at* http://www.dnr.wi.gov/lakes/lakebook/wilakes2009bma.pdf.

2. Wisconsin Department of Natural Resources, Wisconsin River Facts, http://www.dnr.state.wi.us/org/water/division/yow/rivers.htm (last visited Dec. 28, 2010).

interconnected hydrologic systems in the state. It is little wonder, then, that the public trust doctrine, which has traditionally been applied as a means of securing public access to water resources, has become such a powerful tool to protect the quality of Wisconsin's waters held in the public trust.[3] And, with the recent enactment of the Great Lakes-St. Lawrence River Basin Water Resources Compact (Great Lakes Compact or Compact) the waters and water-dependent resources within the Great Lakes and St. Lawrence River Basin (Basin) will be further protected through increased administrative scrutiny and strict regulation on a multi-jurisdictional level.[4] The Compact initially prohibits water diversions outside the basin, with highly circumscribed exceptions for "straddling" communities and counties, as well as for diversions in smaller containers.[5] Thus, various entities hold stakes in the implementation and application of the Compact, including state regulatory bodies, private bottling companies, citizens of Compact party states, and municipalities seeking diversions of Basin waters.[6]

In focusing on the shared interests of states and municipalities involved in implementing the Compact, this Comment seeks to address the unique situation presented by the intersection of the public trust doctrine and the Compact. Both the Compact and the public trust doctrine essentially address who can use water resources, and in what ways they may do so.[7] Each of the eight Compact states apply some version of the public trust doctrine in managing their navigable waters,[8]

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3. For a thorough history of the public trust doctrine in Wisconsin, see Mellissa Kwaterski Scanlan, Comment, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 141–42 (2000).

4. *See* Great Lakes—St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 1.3, 122 Stat. 3739, 3742–43 (2008) [hereinafter Compact]; *infra* Parts II.B and III; *see also* WIS. STAT. §§ 281.343–.348 (2009–2010). Wisconsin's parallel enactment of Compact, including provisions that nothing in Wisconsin's enactment of the Compact "may be interpreted to change the application of the public trust doctrine under article IX, section 1, of the Wisconsin Constitution or to create any new public trust rights." § 281.343(1).

5. Compact, *supra* note 4, §§ 4.8, 4.9, 4.12(10); *see also* WIS. STAT. § 281.346(1)(d), (4)(c), (e).

6. *See, e.g.*, Don Behm, *Waukesha Water Plan Review Halted*, JSONLINE, June 9, 2010, http://www.jsonline.com/news/waukesha/96006209.html; Darryl Enriquez, *New Berlin's Request for Lake Water Approved, A First Under Great Lakes Compact*, JSONLINE, May 21, 2009, http://www.jsonline.com/news/waukesha/45700837.html.

7. *Compare* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509–24 (1970), *with* Compact, *supra* note 4, §§ 4.8–4.12.

8. *See generally* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007) (describing the various public trust regimes that have arisen in the

and, generally speaking, each state's version of the doctrine provides that the state holds navigable waters and the lands beneath them in trust for the citizens.[9]

However, this Comment will focus exclusively on Wisconsin's version of the doctrine, and how Wisconsin law could affect administration of the Compact in the context of the City of Waukesha's application for a diversion under the Compact. To fully understand the dilemma facing Wisconsin requires analyses of the history and scope of the public trust doctrine in the state, the nature of the obligations under the Great Lakes Compact, and the interaction of Wisconsin law and the Compact's terms in determining rights to the use and enjoyment of water resources.

In Wisconsin, Waukesha is one of two communities already involved in the Compact's diversion application process.[10] The first community to receive Basin water under the Compact was New Berlin, which lies partly within the Basin and whose application for a diversion of Lake Michigan water was quickly granted, based on the amounts to be withdrawn and the municipality's location partly within the basin.[11] Waukesha's application for Lake Michigan water, on the other hand, has proven to be infinitely more controversial. Recently, Waukesha submitted a draft application for a diversion, becoming the first "straddling county" community to do so under the Compact.[12] How Wisconsin (through its Department of Natural Resources (DNR)) handles Waukesha's diversion application will likely implicate local, regional, and even national law, and will have precedential effect on future management of the water and water-dependent resources of the Basin.

This Comment argues that Wisconsin's public trust doctrine is sufficiently broad to afford protection for those uses and forms of waters previously unacknowledged, including groundwater and possibly public drinking water for all state citizens. However, the public trust calculus also requires the state as trustee to weigh the interests at stake against the impact on the waters of the state. Accordingly, the prohibitions on diversions embodied in the Great Lakes Compact will necessarily be evaluated with reference (and deference) to Wisconsin citizens' public

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eastern states, including the eight states party to the Compact: Wisconsin, Minnesota, Michigan, Indiana, Illinois, Ohio, Pennsylvania, and New York).

9. *See* Scanlan, *supra* note 3, at 141–42. *See generally* Craig, *supra* note 8.

10. *See* Behm, *supra* note 6; Enriquez, *supra* note 6.

11. *See* Enriquez, *supra* note 6.

12. *See* Compact, *supra* note 4, § 4.9.3; Behm, *supra* note 6; *see also* WIS. STAT. § 281.343(1e)(d), (4n)(c) (2009–2010).

trust rights in the waters. Likely, there will be no long term clash between the two regimes; however, a claim by a diversion applicant that it has rights to the waters of the state by virtue of status as a state citizen could result in an interesting parsing of the state's dual obligations as 1) trustee for its citizens public resources and 2) the local administrator of the Compact's regional, or even federal requirements.

First, this Comment will evaluate how Wisconsin's expanding public trust doctrine might be argued to encompass water for drinking, and how such a claim could interact with the Compact's implementation. Part II.A begins by examining the history of the public trust doctrine in Wisconsin, emphasizing the doctrine's development toward its current, highly protective form. Part II.B then focuses on the history of the Compact and the process by which it came to be the primary means for protecting Basin waters.

Part III discusses the potential conflicts that may arise between the Compact and Wisconsin's public trust doctrine in the specific context of Waukesha's application for a diversion of Lake Michigan water. Additionally, it evaluates a possible expansion of the public trust to encompass a duty to protect the right to access waters of the state for drinking. Under such an expansion, residents of Waukesha could claim that the public trust disallows any restriction on their access to state water resources and that, provided they comply with other requirements of the public trust, they would be entitled to drinking water without regard to the Compact's multi-jurisdictional application process. Because such a right would supersede the terms of the Compact, the Compact could be nullified as applied to Wisconsinites' asserted rights under the public trust doctrine.

Part IV attempts to reconcile the proposed expansion of the public trust doctrine and the Compact, concluding that under either the public trust doctrine or the operative language of the Great Lakes Compact, protection of Wisconsin's water resources (and the water resources of the Basin at large) will trump any proposed right to obtain drinking water from Lake Michigan. Ultimately, this Comment concludes that Waukesha will receive a diversion of Lake Michigan water, as soon as the City complies with the DNR's regulatory framework.

II. WATER RESOURCE PROTECTION IN WISCONSIN

Throughout its existence, and even prior to its entry into the Union, Wisconsin has held the protection of its waters to be of paramount concern. Upon entry into the Union as a State, Wisconsin memorialized

these protections in the state constitution.[13] As the public trust doctrine has developed in the state, the legislature and the courts have respectively crafted and defined the state's policy of responsible resource protection.[14] This is evident in the recent enactment of the Compact, which illustrates Wisconsin's commitment to protecting the waters of the state that lie within the Great Lakes Basin.[15] Each of these protective measures suggests the history behind the protection of water resources in Wisconsin, yet each also looks to the future, and how growth through this century and beyond will implicate those limited water resources.

A. Historical and Modern Developments in Wisconsin's Public Trust Doctrine

Throughout the development of the various States' public trust doctrines, numerous authorities have gone into great detail about the foundations of the doctrine generally,[16] as well as Wisconsin's version providing particularly strong resource protections.[17] In light of other such authorities on the subject, this Part provides an encapsulation of that history, with an emphasis on the doctrine's progressive thrust

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13. WIS. CONST. art. IX, § 1 provides:

> Jurisdiction on rivers and lakes; navigable waters[:] . . . The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

14. *See infra* Part II.A.

15. *See infra* Part II.B.

16. *See*, *e.g.*, Sax, *supra* note 7; *see also* Craig, *supra* note 8. For an illuminating critical historical analysis of the public trust doctrine's pronouncement in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), see generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004).

17. *See* Scanlan, *supra* note 3, at 141–45. *See generally* John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105 (1994). Both of these articles provide thorough background to the doctrine's development in Wisconsin; because the focus of this Comment is on the proposed recognition of the public trust doctrine as applying to water for drinking in Wisconsin, readers interested in an in-depth analysis of the doctrine's history in the state will find these sources very helpful. *See also* Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322, 350–52 (2006) (praising Wisconsin's strong, environmentally protective public trust doctrine).

toward broad water resource protection.

The public trust doctrine is often discussed as derived from Roman law, which declared that natural law provided that rights in the air, water, seas, and seashore are held in common by all of humankind.[18] From that basis, the English common law provided that the monarch held title to the beds beneath all tidal waters in trust for the benefit of the people.[19] The purpose of the monarch holding title was to secure the avenues of commerce and navigation through the tidal waters within the nation's boundaries and, initially, public trust law in the nascent United States often adhered to the tidal rule.[20] Soon thereafter, though, the problems of applying the water law of a narrow island nation became manifest, and the doctrine was expanded to encompass the nation's vast network of non-tidal navigable waters.[21] However, even as states began to modify the doctrine to encompass non-tidal waters, the concepts of commerce and navigation remained central to the development of the public trust doctrine over the following two centuries.[22]

Wisconsin eventually enshrined the doctrine in the state's constitution, adopting the language of the Northwest Ordinance to provide that the navigable waters of the state, including those forming boundaries with other states, were to be "common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."[23] From that declaration and subsequent legislative enactments, Wisconsin courts have interpreted the doctrine to include almost all waters of the state for myriad uses.[24] From early decisions that held that the state holds the title to beds of lakes in trust for the benefit of the citizens,[25] to determinations that recreation and aesthetics may supplement

18. *See* J. INST. 2.1.1; *see also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 428–34 (1989). *But see* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 249–51 (1992) (suggesting that the communal conception of air and water rights may have been less of a practical reality than modern environmentalists relying on the doctrine's idealistic history may prefer to believe).

19. Scanlan, *supra* note 3, at 141.

20. *See* Kearney & Merrill, *supra* note 16, at 826–28 (discussing the English common law rule that the monarch held title to only those lands subject to the ebb and flow of the tides, and citing early U.S. cases upholding the doctrine's application to solely tidal waters).

21. *See id.* at 828–33.

22. *See* Scanlan, *supra* note 3, at 141.

23. WIS. CONST. art. IX, § 1.

24. *See, e.g.*, WIS. STAT. § 281.11 (2009–2010) (establishing the legislative purpose of protecting "all waters of the state, ground and surface, public and private"); Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 505, 511–12, 53 N.W.2d 514, 519, 522–23 (1952).

25. Ne-Pee-Nauk Club v. Wilson, 96 Wis. 290, 294–96, 71 N.W. 661, 662 (1897).

protections for navigation and commerce,[26] to current statutes empowering the DNR's broad authority over natural resource protection,[27] the Wisconsin Legislature and courts have crafted a doctrine that affords broad protections to citizens' rights to enjoy the benefit of the state's waters.

While the common law development of the doctrine includes a multitude of cases spanning 150 years, the doctrine's essence can be derived from five cases that have effectively canonized Wisconsin's operative definition of its public trust doctrine.[28] Beginning at the end of the nineteenth century, the Wisconsin Supreme Court began to address the issues of navigability and ownership interests in navigable waters.[29] In *Willow River Club v. Wade*, the Court held that the requirement for navigability was whether the waterway was "navigable in fact" and that riparian owners' rights in the land beneath navigable waterways were subject to the rights of the public.[30] Responding to a claim against a fisherman who had entered the Willow River at a public access point and fished along the reach that crossed the plaintiff's property, the court applied a modified definition of navigability so as to provide the public with access to the waters of the state for fishing.[31] The court concluded that the Willow River was navigable and provided that the test for navigability was not whether a river or waterway is *actually* used for commerce, but whether it is navigable in fact, that is, whether it *could* be used for commerce.[32] Further, the court held that a riparian owner does not hold an exclusive right to the bed of the stream, but that his ownership and possession of the bed is subject to the public trust, which

26. *Muench*, 261 Wis. at 511–12, 53 N.W.2d at 522–23.

27. *See, e.g.*, WIS. STAT. §§ 281.11, .12, .31. These sections generally set forth the policy goals and duties of the Department of Natural Resources; namely, to protect the navigable waters of the state in furtherance of the "public health, safety, convenience and general welfare." WIS. STAT. § 281.31(1).

28. *See generally* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *Muench*, 261 Wis. 492, 53 N.W.2d 514; Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914); Priewe v. Wis. State Land & Improvement Co., 103 Wis. 537, 79 N.W. 780 (1899); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898). Additionally, some recent developments in Wisconsin's public trust jurisprudence have extended the doctrine and suggest an even broader reading than had previously been maintained. *See, e.g.*, ABKA Ltd. P'ship v. Wis. Dep't Natural Res., 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854 (2002); Lake Beulah Mgmt. Dist. v. Wis. Dep't Natural Res., 2010 WI App. 85, 327 Wis. 2d 222, 787 N.W.2d 926 (2010).

29. *Willow River Club*, 100 Wis. at 91, 76 N.W. at 273.

30. *Id.* at 99–102, 76 N.W. at 276.

31. *Id.* at 91–93, 99–102, 76 N.W. at 273, 276.

32. *Id.* at 99–102, 76 N.W. at 276.

affords members of the public access to the stream.[33] Finally, the court established that the public right to the stream included the right to fish, and to keep those fish caught, subject to the legislature's reasonable imposition of limits on hunting and fishing.[34]

The next year, the court recognized that lands covered by navigable waters could not be transferred to private individuals for private benefit, even if the purported reason for the transfer was the health, safety, and welfare of the public.[35] In *Priewe v. Wisconsin State Land & Improvement Co.*, the court invalidated a legislative act that allowed a private individual to drain part of a lake so as to develop the resultant exposed land.[36] Thereby, the court formally recognized the principle that the legislature was bound by its duty to protect the navigable waters of the state for the citizens' benefit and that any attempts to breach that duty would be invalid.[37]

The Wisconsin Supreme Court further recognized the broad scope of the public trust doctrine in *Diana Shooting Club v. Husting*, in which it clarified the nature of riparian title and the rights that appertain to such title.[38] While riparian owners do in fact hold title to the streambed, the court held that title is qualified and is effectively subject to a public easement by which all members of the public may use the stream.[39] The *Diana* court concluded that use of the state's waters for hunting was a necessary right incidental to navigation, and that such right is thus protected by the Wisconsin Constitution.[40] In recognizing the expansive nature of the doctrine, the court provided a wholly inclusive directive for interpreting the doctrine's scope, concluding that:

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33. *Id.*

34. *Id.* at 102–03, 76 N.W. at 277. Additionally, the Wisconsin Constitution now includes the right of the people "to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law." WIS. CONST. art. I, § 26.

35. *See* Priewe v. Wis. State Land & Improvement Co., 103 Wis. 537, 548–49, 79 N.W. 780, 781 (1899).

36. *See id.* at 548–53, 79 N.W. at 781–83.

37. *Id.* at 548–50, 79 N.W. at 781. At this point, it is imperative to clarify the distinction between the rights traditionally recognized under the public trust doctrine and the trajectory that Wisconsin has followed. Traditionally, the public trust was understood to protect the public's interest in access to water *bodies*, for the purposes of navigation, etc. However, as discussed below, Wisconsin has applied the doctrine in such a way that more than simply access is protected. Rather, and especially since recognizing a public right in the protection of esthetic beauty, Wisconsin's doctrine can be seen as requiring the state to evaluate all potential benefits that can be derived from water, including its use for drinking.

38. *See* Diana Shooting Club v. Husting, 156 Wis. 261, 268–69, 145 N.W. 816, 819 (1914).

39. *See id.*

40. *Id.* at 269–70, 145 N.W. at 819.

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein.[41]

While the court qualified its holding by limiting the scope of the public trust to those areas within the ordinary high water mark and only when they are covered by water,[42] the *Diana* decision has endured as a hallmark of the broad interpretation accorded public rights in the use and protection of the state's waterways.[43]

That fundamental conception of the public trust was reaffirmed in *Muench v. Public Service Commission*, in which the court held that the test for navigability was not merely whether a waterway was actually used for commerce or navigation, but whether it could support floating a small personal watercraft, even for recreation.[44] The court reaffirmed

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41. *Id.* at 271–72, 145 N.W. at 820. The spelling of the word "inure" differs in the two cited reporters. The Wisconsin Reporter spells the word "inure," while the Northwestern Reporter spells the word "enure." *Black's Law Dictionary* defines "inure" as "to take effect; to come into use." BLACK'S LAW DICTIONARY 829 (7th ed. 1999). The entry for "enure" redirects to the entry for "inure." *Id.* at 554.

42. *Id.*

43. *See, e.g.*, Just v. Marinette County, 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768–69 (1972) (recognizing Wisconsin's long history of the state's public trust duty to protect water resources for various public purposes); Wisconsin's Envtl. Decade, Inc., v. Dep't Natural Res., 85 Wis. 2d 518, 526, 534, 271 N.W.2d 69, 72–73, 76 (1978) (reaffirming rich legacy of Wisconsin's protection of public trust resources).

44. Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 512, 53 N.W.2d 514, 523 (1952) ("Our holding . . . is in keeping with the trend manifested in the development of the law of navigable waters in this state[,] extend[ing] the rights of the general public to the recreational use of the waters of this state, and . . . protect[ing] the public in the enjoyment of such rights."). Navigability has been further refined to look to whether a waterway could float a small personal watercraft at some point in an annual cycle, such as during spring melt. *See* DeGayner & Co. v. Wis. Dep't Natural Res., 70 Wis. 2d 936, 946–47, 236 N.W.2d 217, 222 (1975). *DeGayner* provided that the test for navigability is not dependent on the natural level of the water, as long as an artificial water level, such as that created by beaver ponds (as was the case in *DeGayner*), is shown to have been present "for a period of time." *Id.* at 946.

prior holdings recognizing public rights to recreation and enjoyment of scenic beauty and further provided that citizens need not assert any financial gain to have standing to maintain an action to protect the public trust.[45] Recognizing the *Diana* court's broad interpretation of the trust, the court in *Muench* held that the rights under the trust should not be narrowly construed, but rather that the rights of the public in the trust are to be vigorously defended.[46] The *Muench* court also determined that the substance of the public trust was of such statewide concern that power to determine matters impacting trust resources could not be delegated to local governing bodies.[47] While the state is free to assign to local control matters of purely local concern, the statewide nature of the trust prohibits the trustee from delegating its statewide duty where such delegation would damage or destroy trust resources for localized "benefit," such as constructing a dam across a scenic river.[48]

The interplay between local and state governance with respect to the public trust was also addressed in *Just v. Marinette County*, in which the court upheld local ordinances that were found to be in furtherance of the state's interest in protecting trust resources.[49] At issue in *Just* was a shoreland zoning ordinance that required a permit for certain modifications to riparian property.[50] The court recognized that remediation and prevention of pollution are duties that the state as trustee must undertake in protection of trust resources,[51] while also allowing the state discretion to delegate its police power to Marinette County to prevent the pollution of local waterways.[52] The court emphasized the distinction between certain delegations of authority, and held that those delegations that further the purpose of the public trust will be valid, whereas delegations that result in local abdication of trust responsibility will be invalid.[53]

Collectively, the preceding cases provide the foundation upon which

45. *Muench*, 261 Wis. at 511–12, 53 N.W.2d at 522–23.

46. *See id.* at 512, 53 N.W. at 522–23.

47. *Id.* at 515, 53 N.W. at 524.

48. *See id.*

49. 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768–69 (1972).

50. *Id.* at 9–13, 201 N.W.2d at 764–66.

51. *Id.* at 16–17, 201 N.W.2d at 767–68.

52. *Id.* at 18, 201 N.W.2d at 768–69.

53. *See* Menzer v. Vill. of Elkhart Lake, 51 Wis. 2d 70, 75–78, 186 N.W.2d 290, 293–95 (1971) (distinguishing the invalid delegation of legislative authority in *Muench* on the grounds that the legislation at issue in *Elkhart Lake* was, in fact, in furtherance of the public health, safety, and welfare).

any potential recognition of the trust's applicability to drinking water would be based.[54] Currently, the scope of the public trust clearly includes all navigable waterways, bounded by the ordinary high water mark.[55] And, while navigation surely is still a valid purpose for protecting the public trust resources, the purpose of the doctrine—that is, to protect the waters of the state and access thereto for the public benefit—can also be invoked for the prevention of pollution, the furtherance of recreation (including hunting, fishing, boating, and swimming), and the protection of scenic beauty.[56]

Moreover, a recent Wisconsin Court of Appeals decision has set forth a substantial development in Wisconsin's public trust law.[57] While courts had previously confined their analyses of public trust rights to "navigable" waters and the lands beneath, *Lake Beulah Management District v. Wisconsin Department of Natural Resources* broke new ground, holding that the DNR was bound to undertake a traditional public trust analysis in issuing groundwater permits.[58] Though the water at issue in the permit process was clearly not navigable, the court emphasized the legislature's stated intent of broadly construing the DNR's powers to allow for the most comprehensive management of ground and surface waters, to the benefit of the state's citizens and natural systems.[59]

Lake Beulah involved the Village of East Troy's application for

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54. Other, more recent cases further exemplify Wisconsin's increasingly broad protection of public resources. *See, e.g.*, R.W. Docks & Slips v. State, 2001 WI 73, ¶ 20, 244 Wis. 2d 497, 628 N.W.2d 781; Wisconsin's Envtl. Decade, Inc. v. Dep't Natural Res., 85 Wis. 2d 518, 526, 534, 271 N.W.2d 69, 72–73, 76 (1978); Lake Beulah Mgmt. Dist. v. Wis. Dep't Natural Res., 2010 WI App. 85, ¶¶ 25–27, 327 Wis. 2d 222, 787 N.W.2d 926 (2010).

55. *See* State v. Trudeau, 139 Wis. 2d 91, 102–03, 408 N.W.2d 337, 342 (1987). The court in *Trudeau* summarized the state of public trust law as it pertains to water body delineations (recognizing that the ordinary high water mark is the boundary of the state's interest, Diana Shooting Club v. Husting, 156 Wis. 261, 269, 145 N.W. 816, 820 (1914)) to hold that a property adjacent to Lake Superior that would be inundated with water but for artificial barriers was in fact part of the lake bed and thus trust property. *Trudeau*, 139 Wis. 2d at 108–09, 408 N.W.2d at 344–45.

56. *Wisconsin's Envtl. Decade*, 85 Wis. 2d at 526, 534, 271 N.W.2d at 72–73, 76 (1978).

57. At least for the time being. At the time of publication, the *Lake Beulah* case was pending before the Wisconsin Supreme Court. *See* Press Release, Wis. Court System, Supreme Court Accepts Two Walworth County Cases, (Nov. 17, 2010), http://www.wicourts.gov/news/view.jsp?id=225.

58. *See id.* ¶¶ 17–27.

59. *See, e.g.*, WIS. STAT. § 281.11 (2009–2010) (stating that the DNR's role in water resource protection "shall be liberally construed" in furtherance of the subchapter's purpose of protecting "the waters of the state, ground and surface, public and private"); *Lake Beulah,* 2010 WI App. 85, ¶ 27, 327 Wis. 2d 222, 787 N.W.2d 926 ("[T]he DNR has authority to become involved whenever it sees a public trust doctrine problem.").

permits for a mid-sized groundwater well near Lake Beulah.[60] Two local conservancy groups challenged the DNR's issuance of the permits, alleging that the DNR failed to comply with its statutory and public trust obligations in managing environmental resources.[61] Initially, the conservancies' petition for a contested case was dismissed as moot when the challenged permit was superseded by the issuance of a more recent permit.[62] The conservancies then petitioned for a review of the later-issued permit, and the circuit court dismissed that petition as well.[63] The circuit court held that, while the DNR did have a right to consider the public trust doctrine in issuing groundwater permits, it was not under any obligation to do so, as the circuit court found there was "an absolute dearth of any proof" to challenge the DNR's determination.[64]

However, the court of appeals concluded that both the circuit court and the DNR had failed to give proper consideration to an affidavit submitted by a licensed geologist stating that the well at issue would have a detrimental impact on local water resources.[65] Reversing in part, the court of appeals held that specific statutory provisions applicable to the issuance of groundwater permits did not abrogate more general public trust obligations vested in the DNR.[66] In particular, the court noted that the specific grant of authority to investigate well permit applications did not interfere with the DNR's broad authority to "intercede *where the public trust doctrine is affected.*"[67]

Thus, after the recent development of the doctrine,[68] the trustee's obligations are more comprehensive than previously understood, in that the state is expected to engage in its fiduciary duties regarding public trust resources whenever there is evidence that those resources may be affected. Though *Lake Beulah* may be touted as expanding the trustee's duties to apply beyond the traditional notion of navigable waters, in effect the case is merely an affirmation of the interconnectedness of hydrologic systems, a concept that is generally accepted by the scientific community.[69]

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60. *See Lake Beulah*, 2010 WI App. 85, ¶¶ 2–8, 327 Wis.2d 222, 787 N.W.2d 926.
61. *See id.* ¶¶ 5–13.
62. *See id.* ¶¶ 5–10.
63. *See id.* ¶¶ 12–13.
64. *See id.* ¶ 13.
65. *See id.* ¶¶ 9, 39.
66. *See id.* ¶¶ 17–27.
67. *Id.* ¶ 27 (emphasis added).
68. *See supra* note 57.
69. *See, e.g.*, Craig Anthony (Tony) Arnold, *Clean-Water Land Use: Connecting Scale and Function*, 23 PACE ENVTL. L. REV. 291, 316–21 (2006).

Hence, Wisconsin courts have readily recognized various purposes to which the doctrine applies beyond the original conception of only securing waters and the lands beneath for navigational purposes. As will be discussed in Parts III & IV, *infra*, recognition of the doctrine as applying to water for drinking may be argued as a necessary expansion in light of the increasing pressure on the trust's water resources.

B. Compact History, from the Boundary Waters Treaty of 1909 Through Today

The development of the Great Lakes Compact has been guided by the Basin's multi-jurisdictional nature. The Great Lakes and the St. Lawrence River, which are considered one interconnected hydrologic unit,[70] are subject to the laws of eight states, two provinces, and two federal governments, as well as treaty and aboriginal rights belonging to numerous federally recognized Indian tribes and First Nations.[71] The need to manage the Basin's water resources in a comprehensive manner has resulted in an evolution of treaties, agreements, and now the Compact, all of which have been intended to ensure that the resources are thoroughly and responsibly protected.[72] From the Boundary Waters Treaty of 1909 to the current implementation of the Compact, these various efforts have sought to balance the needs of commerce and social development with adequate protection of the water and water-dependent resources of the Basin.[73]

Accordingly, the structure framing Waukesha's diversion application has been built over a century of shared management of the Great Lakes. The international push to protect the Great Lakes Basin began in the early twentieth century with the Boundary Waters Treaty of 1909 between the United States and Canada.[74] The Treaty established the International Joint Commission, which is a body composed of three members from each nation and intended to provide review of matters relating to the use of the boundary waters specifically pertaining to

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70. *See* Mellissa Kwaterski Scanlan et al., *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 VT. J. ENVTL. L. 39, 49–51 (2006).

71. *See generally* Council of Great Lakes Governors, Great Lakes-St. Lawrence River Basin Water Resources Compact Implementation, http://cglg.org/projects/water/Compact Implementation .asp (last visited Dec. 29, 2010).

72. *See, e.g.*, Scanlan et al., *supra* note 70, at 49–59.

73. Numerous pieces have provided thorough histories of the lead-up to the Compact's enactment, including the various treaties and agreements involving the protection of Basin resources. *See, e.g.*, *id.* (citing multiple authorities on the various resource protection regimes in the Basin throughout the twentieth and twenty-first centuries).

74. Treaty Relating to Border Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448–50.

shipping and trade.[75] The treaty, still in effect today,[76] requires Commission review of actions that would impact water levels beyond certain thresholds.[77] The thresholds, however, were set so high that the Commission has never been required to issue a binding determination.[78] This fact, in combination with the Treaty's lack of feasible management standards and limited applicability, has resulted in its limited impact on securing the water resources of the Basin.[79]

After the Treaty, the eight Great Lakes states and two provinces entered into the Great Lakes Charter of 1985, which was a voluntary agreement to restrict Basin diversions.[80] However, the voluntary Charter's lack of meaningful standards by which diversions were to be regulated has proven impossible to enforce, leaving the Basin states and provinces with a toothless management tool.[81] In an attempt to strengthen the Charter, it was amended in 2001 to provide a legally binding agreement as a means of implementing the previously enacted Water Resources Development Act of 1986.[82]

The Water Resources Development Act of 1986 is a federal law that embodied the Congressional purpose of taking immediate action to protect Basin resources by requiring the unanimous consent of Great Lakes governors for diversions of water out of the Basin.[83] The Act, still in effect today, does not provide the governors with clear standards by which to evaluate proposed diversions; instead it applies a per se ban on diversions without the unanimous consent of the Great Lakes governors.[84] Additionally, the Act does not clearly designate whether it applies to groundwater resources within the Basin, nor have there been

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75. *See id.* at 2449; *see also* U.S. Fish & Wildlife Service, Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, http://www.fws.gov/laws/lawsdigest/treaty.html (last visited Dec. 29, 2010).

76. *See, e.g.*, Compact, *supra* note 4, § 4.11.4 (requiring that decisions under the Compact are to be made in accordance with the Boundary Waters Treaty of 1909).

77. Scanlan et al., *supra* note 70, at 50–51.

78. *Id.*

79. *Id.*

80. COUNCIL OF GREAT LAKES GOVERNORS, THE GREAT LAKES CHARTER: PRINCIPLES FOR THE MANAGEMENT OF GREAT LAKES WATER RESOURCES 1–3 (1985), *available at* http:// www.cglg.org/projects/water/docs/GreatLakesCharter.pdf.

81. Scanlan et al., *supra* note 70, at 52–53.

82. COUNCIL OF GREAT LAKES GOVERNORS, THE GREAT LAKES CHARTER ANNEX: A SUPPLEMENTARY AGREEMENT TO THE GREAT LAKES CHARTER 2–3 (2001), *available at* http:// www.cglg.org/projects/water/docs/Annex2001.pdf [hereinafter ANNEX]; Scanlan, *supra* note 70, at 56–57.

83. 42 U.S.C. § 1962d–20 (2006).

84. *Id.* § 1962d–20(d); Scanlan et al., *supra* note 70, at 54–56.

any judicial interpretations to clarify the issue.[85] Moreover, in *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of America, Inc.*, a federal court held that the Act does not provide a private cause of action to enforce its prohibitions on diversions, nor does it provide for criminal penalties for its violation.[86] Therefore, amidst the doubt as to whether the Act afforded sufficient protection to the Basin resources, the Great Lakes states and provinces entered into the Compact to ensure that the region's waters would not be subject to ecologically or economically debilitating diversions.[87]

Before delving into the specifics of the Great Lakes Compact, a basic discussion of the role of compacts in federal and interstate relations will frame the discussion of the rights and obligations established by this particular Compact. Interstate compacts, which are sanctioned by the Constitution,[88] have provided a means by which states could enter into agreements for various purposes, including the delineation of shared boundaries,[89] involvement in common-interest projects such as the building of dams and bridges,[90] and the creation of regional or sub-regional administrative endeavors, such as resource management,[91] among others.[92]

Though the text of the Constitution would suggest that states must obtain Congress's approval for such compacts to be effective, the Supreme Court has in many instances allowed interstate agreements to stand without such explicit consent.[93] The Court has established that an interstate agreement will be upheld where the subject matter of the agreement does not impinge on the supremacy of the federal government or where Congress has knowledge of such agreements and has acquiesced to their existence.[94] However, where Congress has affirmed the states' compact through federal legislation, federal law will

85. ANNEX, *supra* note 82, at 1; Scanlan et al., *supra* note 70, at 54–55.

86. *See* Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc., 203 F. Supp. 2d 853, 856, 865 (W.D. Mich. 2003).

87. Compact, *supra* note 4, § 1.3(d).

88. U.S. CONST. art. I, § 10, cl. 3.

89. *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503, 504 (1893).

90. *See, e.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 557 (1851).

91. *See, e.g.*, Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928) (current version at 43 U.S.C. § 617 (2006)).

92. *See* Emily Jeffers, Note, *Creating Flexibility in Interstate Compacts*, 36 ECOLOGY L.Q. 209, 219–21 (2009).

93. *See* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 762–66 (2010).

94. *Id.* at 764.

provide the controlling rule of decision.[95]

Thus, due to the multi-jurisdictional nature of compacts and the applicability of state law, federal law, or both, the administration of the Compact will likely present unique legal and administrative challenges. This is evident in some of the scholarly literature that has already undertaken to analyze the Compact and the possible avenues for its implementation.[96] For example, it has been asserted that the Compact, as a federal law, will preempt state common law, namely public trust law.[97] However, as will be discussed below, the language of the Compact, Wisconsin's implementing legislation, and the nature of Wisconsin's public trust doctrine will not likely reach an impasse.[98]

As has been shown, the process of adopting an interstate compact involves numerous levels of legislative maneuvering, followed by further legal and administrative implementation. During the process of drafting multiple versions of the Compact, the states and various interest groups wrangled over specifics, including the amounts allowed as exceptions to the general prohibition on diversions, whether water for bottling would be excepted from the ban, and what the administrative procedure would be for granting diversion applications.[99] After roughly agreeing upon terms of the Compact, in 2005 the governors and Canadian provincial premiers met in Milwaukee to sign the final draft of the Great Lakes Compact and Sustainable Water Resources Agreement.[100] Then, before being passed by Congress and signed by President George W. Bush in

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95. *See, e.g.*, *Pennsylvania*, 54 U.S. (13 How.) at 566 ("This compact, by the sanction of Congress, has become a law of the Union."). *But see* Compact, *supra* note 4, § 7.3 (granting concurrent federal and state jurisdiction over actions seeking to enforce the Compact, establishing that the Parties' laws and administrative procedures will apply in hearings seeking such enforcement, and allowing Parties to craft state law enforcement mechanisms and remedies "to assist in the implementation of [the] Compact").

96. *See, e.g.*, Bridget Donegan, Comment, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. ENVTL. L. & LITIG. 455 (2010); *see also* Scanlan et al., *supra* note 70, at 44–49.

97. *See* Donegan, *supra* note 96, at 488.

98. As discussed in *infra* Part IV, the DNR's administration of the Compact and its public trust duties will provide that, upon a showing of no reasonable alternative and no significant danger to water resources and ecosystem integrity, Waukesha's diversion application will be approved.

99. *See* Jessica A. Bielecki, Comment, *Managing Resources with Interstate Compacts: A Perspective from the Great Lakes*, 14 BUFF. ENVTL. L.J. 173, 184–87 (2007); *see also* Lauren Petrash, Note, *Great Lakes, Weak Policy: The Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of the Water "Products" Industry*, 39 U. MIAMI INTER-AM. L. REV. 145, 147–52 (2007); Press Release, Rep. Bart Stupak, Stupak: No Diversion of Great Lakes Water. Period. (Aug. 31, 2004), http://www.house.gov/ stupak/press2003-2004/083104water.html.

100. *See* Bielecki, *supra* note 99, at 185–87.

2008, the Compact made its way through eight statehouses, with varying degrees of immediacy.[101]

As enacted, the Compact is a binding eight state agreement that also provides for involvement by the provinces of Quebec and Ontario, as well as Indian tribes and First Nations.[102] The Compact's main purpose is to prohibit diversions of Basin water beyond the geographical boundaries of the Basin.[103] The Compact is distinguishable from its predecessor, the Water Resource Development Act, by its establishment of a Regional Council to oversee exemption applications and specific standards by which exemption applications are to be evaluated.[104] In addition to establishing the Regional Council (composed of the governors of the eight Compact states), the Compact recognizes a Regional Body, which also includes the premiers of Ontario and Quebec and is charged with oversight authority in the Regional Review process.[105] To achieve its stated purposes of protecting and managing water and water-dependent resources, the Compact delineates a process by which each state (Party) administers its own application program and, upon a Party's approval of an application, provides for review of the application by the Regional Body.[106]

Though the Compact initially imposes a complete ban on diversions of water from within the Basin, it does qualify that ban to allow exemptions for communities that straddle the Basin drainage line, as well as for communities that lie wholly outside of the Basin but are within counties that straddle the drainage line.[107] To meet the requirements for an exemption, these communities must: 1) use the water only for public water supply purposes; 2) secure return flow of the

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101. Press Release, Council of Great Lakes Governors, President Bush Signs Great Lakes Compact (Oct. 3, 2008), http://www.cglg.org/projects/water/docs/PressRelease PresidentSignsCompact10-3-08.pdf; *see also* Dana M. Saeger, Comment, *The Great Lakes–St. Lawrence River Basin Water Resources Compact: Groundwater, Fifth Amendment Takings, and the Public Trust Doctrine*, 12 GREAT PLAINS NAT. RESOURCES J. 114, 115–19 (2007); Draft, Great Lakes Basin Water Resources Compact (July 19, 2004), http://dnr.wi.gov/org/water/greatlakes/annex2001/Great%20Lakes%20Compact%207-19-04-Public%20Release.pdf.

102. *See* Compact, *supra* note 4, § 4.5.

103. *See id.* §§ 1.3, 4.8.

104. *Id.* §§ 2.1, 3.2, 4.11.

105. *Id.* §§ 1.2, 4.5.

106. *Id.* § 4.5.

107. *Id.* §§ 4.9.1, 4.9.3. New Berlin, whose diversion request was quickly granted under the Compact, is a straddling community, in that part of the municipality lies within the Lake Michigan watershed; in contrast, the straddling county exception which applies to Waukesha allows applications from communities that lie entirely outside the watershed, as long as the county in which that community is situated "straddles" the Basin/watershed line.

diverted water or sufficiently comparable water sources, with an allowance for consumptive use; 3) if the proposed diversion would be over 100,000 gallons per day, meet the Compact Exception Standard, which requires that the diversion will not have detrimental impacts on Basin resources and natural systems; and 4) if the proposed diversion would be over five million gallons per day, the application must undergo Regional Review.[108]

III. CROSSROADS OF CONSERVATION: THE INTERSECTION OF THE PUBLIC TRUST DOCTRINE AND THE COMPACT

Because the initial determination of an exemption applicant's satisfaction of the Exception Standards is to be made by the state body entrusted with management of water resources,[109] the potential for overlap with public trust issues is significant. For example, Wisconsin Statutes § 281.346 provides that the DNR is the body charged with administering the requirements of the Compact,[110] and § 281.11 establishes the DNR's role in managing water resources under the auspices of the public trust.[111] Thus, by these and other statutory provisions,[112] state functions of water management are coordinated with those imposed by the Compact and evaluated under Regional Review.

Additionally, the Compact expressly recognizes the specific interests of the member states in maintaining their respective water law regimes, including their versions of the public trust doctrine.[113] Though the terms

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108. *Id.* §§ 4.9.1, 4.9.3, 4.9.4. Among other requirements, the Exception Standard requires that diversion applicants have no reasonable alternatives through "efficient use and conservation of existing water supplies." *Id.* § 4.9.4.a. This aspect of the Exception Standard has already hamstrung Waukesha's application as the DNR determined the City had not sufficiently ruled out other alternatives to Lake Michigan water. *See* Letter from Matthew J. Frank, Secretary, Wis. Dep't of Natural Res., to Jeffrey Scrima, Mayor, City of Waukesha (June 8, 2010), http://dnr.wi.gov/org/water/dwg/greatlakes/Waukesha/ Scrima_6_10_letter.pdf.

109. Compact, *supra* note 4, § 2.6 (providing that the Compact Parties seek to utilize those offices and agencies established for the purpose of water resource management).

110. WIS. STAT. §§ 281.01(3), .346 (2009–2010) (charging the DNR with duties of evaluating applications and making determinations as to the feasibility of the proposed diversion in light of the Compact and state water management requirements).

111. *See* WIS. STAT. § 281.11 (setting forth purpose of the DNR as securing protections for waters of the state).

112. *See, e.g.*, WIS. STAT. §§ 30.294, .03(4) (establishing that any violation of statutes relating to navigable waters is deemed a nuisance and the power of DNR to enforce chapter relating to navigable waters); *see also* Gillen v. City of Neenah, 219 Wis. 2d 806, 812, 580 N.W.2d 628, 629–30 (1998) (establishing that private parties may bring suit to enjoin public nuisance under public trust doctrine).

113. *See* Compact, *supra* note 4, § 8.1 (preserving rights as they exist in state common law, thereby preserving rights under the public trust doctrine according to the specific incarnation of the doctrine adopted in each state). *See generally* Craig, *supra* note 8.

of the Compact provide that a state's common law will be determinative of conflicts involving state public trust law,[114] the Parties will inevitably encounter disputes between the development of precedential rulings under Regional Review provided for in the Compact and the furtherance of the states' public trust doctrines. In fact, commentators have already suggested that the Compact creates a new, hybrid law that supersedes state public trust doctrine.[115]

However, such analysis misconstrues the purpose and scope of the Compact and its intersection with the Parties' laws, be they statutory or judge-made. By stating its finding that the "Waters of the Basin are precious public natural resources shared and held in trust by the States," the Compact does not create a new public trust.[116] This is confirmed in the Compact's clear statement that it is not intended to abrogate the individual States' public trust rights.[117] Moreover, Wisconsin's enabling legislation for the Compact specifically disclaims any possibility that the Compact was construed as modifying or negating Wisconsin public trust law.[118]

This potential jurisdictional jumble serves as a theoretical backdrop as the City of Waukesha engages in the very real process of seeking water to replace or supplement its diminishing municipal water sources. Waukesha—once known for the quality and believed health benefits of its waters—is currently facing a water crisis as a result of the City's

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114. *See* Compact, *supra* note 4, § 8.1.2.

115. *See, e.g.*, Donegan, *supra* note 96, at 487–94.

116. *See* Compact, *supra* note 4, § 1.3.1.a.

117. *See id.* § 8.1.2.

118. *See, e.g.*, WIS. STAT. § 281.346(2)(g) (2009–2010) ("Nothing in this section may be interpreted to change the application of the public trust doctrine under article IX, section 1 of the Wisconsin Constitution or to create any new public trust rights."). It remains to be seen whether enforcement of this provision in a manner contrary to the concept of a Basin-wide public trust would constitute a material breach of the Compact. *See, e.g.*, Donegan, *supra* note 96, at 491–94. However, read together, Compact §§ 1.3.1.a, 8.1.2, and 8.1.4 reasonably convey that the Compact did not not create from whole cloth a Basin-wide trust. These provisions, in coordination with the Compact's policy of "preserv[ing] and utiliz[ing] the functions, powers, and duties of existing offices and agencies" suggest that those agencies will operate within familiar regulatory frameworks and not adopt an entirely new system of regulations. *Id.* § 2.6. It seems entirely inconsistent, and beyond the intended scope of the Compact (given the reservations of some parties in adopting the Compact in the first place, for example Wisconsin, *see* Saeger, *supra* note 101, at 117–19) that the States' ultimate adoption of the Compact would cede such vast control over water resources. Rather, those provisions show that it is the State's trusts that are implicated, and that the Compact is intended to be a collective management tool, based on each state's already-established water/trust law. Hence, Wisconsin's inclusion of the statement in Wisconsin Statutes section 281.346(2)(g) simply clarifies that fact.

expanding population and its diminishing groundwater resources.[119] Despite the city's relative proximity to Lake Michigan, Waukesha lies outside the Great Lakes surface water basin and has historically drawn its water from sandstone aquifers and from surface waters from the Mississippi River Basin.[120] Now, those aquifers have been so depleted that concentrations of radioactive radium found in Waukesha's drinking water are above levels recognized as acceptable.[121] In light of the declining quality of its waters and the need to provide for municipal expansion, Waukesha recently submitted to the DNR a draft application for a Lake Michigan water diversion according to the terms of the Great Lakes Compact.[122]

However, Waukesha's application for Lake Michigan water comes amidst much disagreement within the City and the region at large.[123] Of course there are those who maintain that water should not leave the Great Lakes Basin and that no conditions on the terms of a diversion will suffice to protect the Basin.[124] The more mainstream view, though, has been that any diversion of Basin waters needs to be preceded by sufficient studies demonstrating that no reasonable alternatives exist.[125]

This second view has been adopted by the Wisconsin DNR, which initially declined to proceed in analyzing Waukesha's initial draft

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119. *See* JEFFREY EDSTROM & BILL WARD, GEOSYNTEC CONSULTANTS, WAUKESHA WATER UTILITY WATER CONSERVATION AND PROTECTION PLAN 3–6, http://www.ci.waukesha.wi.us/c/document_library/get_file?folderId=42481&name=DLFE-5411.pdf.

120. *See id.*; Shaili Pfeiffer, Great Lakes Compact: Process for Diversion Applications (Jan. 13, 2009), http://www.ci.waukesha.wi.us/c/document_library/get_file?folderId=42481&name=DLFE-5706.pdf.

121. EDSTROM & WARD, *supra* note 119, at 4.

122. *See id.* at 6–7.

123. Waukesha's 2010 mayoral election resulted in the unseating of incumbent Larry Nelson, who was apparently prepared to accept conditions established by the Milwaukee Common Council in allowing Waukesha to take water from Lake Michigan via Milwaukee. *See* Don Behm, *Milwaukee Reminds New Waukesha Mayor of Water Deal's Terms*, JSONLINE, Apr. 21, 2010, http://www.jsonline.com/news/waukesha/91776949.html. Those conditions included a fee to offset Milwaukee's costs in maintaining the urban infrastructure and social framework necessary to subsidize Waukesha's suburban existence, as well as a non-compete agreement intended to prevent Waukesha from courting Milwaukee businesses. *See id.*; *see also* Letter from Milwaukee Common Council to Jeff Scrima, Mayor, City of Waukesha, (April 9, 2010), http://media.journalinteractive.com/ documents/water042210-1.pdf. Furthermore, while Waukesha's recent application for a diversion was submitted to the DNR with near-unanimous consent of the members of the Waukesha Common Council, mayor Jeff Scrima refused to sign a letter reaffirming the City's desire to obtain Lake Michigan water. *See* Don Behm, *Scrima Refuses to Restart Lake Push*, JSONLINE, July 2, 2010, http://www.jsonline.com/news/waukesha/97702724.html.

124. *See, e.g.*, Press Release, Stupak, *supra* note 99.

125. *See, e.g.*, Letter from Matthew J. Frank, *supra* note 108.

application,[126] fraught with discord and uncertainty as it was.[127] Having become the first community to submit an application under the Compact's straddling counties exception,[128] Waukesha is now involved in an administrative (and possibly judicial) process that will ultimately end with a decision by the Wisconsin DNR, though its decision will be shaped by those administrative and judicial processes provided in the Compact.[129] While commentators criticized the DNR's role in New Berlin's diversion application as less than thorough, the degree of scrutiny to which Waukesha's application has been subject is already significantly greater.[130] This discrepancy, though, is structurally part of the Compact. Whereas a straddling community's application for a diversion does not necessarily require Regional Review, application by a straddling-county community that lies entirely outside the Basin requires review by the Compact Council and the Regional Body.[131]

Waukesha has proposed to construct a substantial pipeline to access Lake Michigan water via Milwaukee's existent infrastructure.[132] To return the water to the Lake, as required under the Compact,[133] Waukesha's primary proposal includes discharging its wastewater into nearby Underwood Creek, which eventually flows to Lake Michigan via the Menomonee River. Waukesha's application describes the arrangement as the "restoration" of Underwood Creek to a healthy

126. *See* CITY OF WAUKESHA, APPLICATION FOR LAKE MICHIGAN WATER SUPPLY, http://www.ci.waukesha.wi.us/c/document_library/get_file?folderId=42481&name=DLFE-9236.pdf.

127. *See, e.g.*, *id.*; Letter from Matthew J. Frank, *supra* note 108. After initially refusing to proceed with Waukesha's application, the DNR solicited further information in its attempt to ensure that it had before it all relevant data prior to undertaking any analysis of the city's application materials. *See* Letter from Matthew J. Frank, Secretary, Wis. Dep't of Natural Res., to Paul R. Ybarra, President, Waukesha City Council (Sept. 20, 2010), http://dnr.wi.gov/org/water/dwg/greatlakes/Waukesha/Ybarra_letter_9_20_10.pdf.

128. *See* CITY OF WAUKESHA, *supra* note 126, at 1-3; *see also* Joe Barrett, *City's Water Problems Test Great Lakes Agreement*, WALL ST. J., Nov. 9, 2009, at A9; James Rowen, *Great Lakes Compact Gets First Test*, ISTHMUS (Madison, Wis.), April 9, 2009, *available at* http://www.thedailypage.com/isthmus/article.php?article=25575 (discussing New Berlin, Wisconsin's application as a straddling community and distinguishing the heightened standard of review for straddling counties).

129. *See* Compact, *supra* note 4, §§ 4.5, 7.1–7.3; Pfeiffer, *supra* note 120.

130. *See, e.g.*, Letter from Matthew J. Frank, *supra* note 108; *see also* Rowen, *supra* note 128.

131. Compact, *supra* note 4, §§ 4.5, 4.9; Pfeiffer, *supra* note 120.

132. *See* CITY OF WAUKESHA, *supra* note 126, at 4-25 to 4-37. Waukesha has also suggested the cities of Racine and Oak Creek as potential sources from which it might seek Lake Michigan water. *See* Letter from Donald Gallo, Attorney for the City of Waukesha to Matthew J. Frank, Secretary, Wis. Dep't of Natural Res. (Sept. 1, 2010), http://dnr.wi.gov/org/water/dwg/greatlakes/Waukesha/Water_supply_alt_9_1_10.pdf.

133. *See* Compact, *supra* note 4, § 4.9.4.c.

watercourse through imposition of strict water quality standards.[134] However, in addition to receiving Lake Michigan water from Milwaukee and sending return flow through Underwood Creek, Waukesha has not established that no reasonable alternative exists.[135]

This process places the precedential spotlight squarely on the DNR's management of the application process. Because the Wisconsin DNR has primary authority regarding the grant of Waukesha's diversion application,[136] there exists a significant need for the DNR to critically analyze applications to ensure that the Compact's terms are satisfied, as well as to meet any state requirements regarding water resource protection. However, with the recent acknowledgement in *Lake Beulah* that the DNR's authority under the public trust doctrine encompasses groundwater, the standards between Compact review and public trust review of water uses has narrowed, if not disappeared entirely.[137]

With respect to satisfying Compact requirements, the DNR's review of an exception application is subject to further review by the Regional Body, wherein the parties to the Compact can either accept a Party's review of the application or, if unsatisfied, request further review.[138] Given that Waukesha's application is the first of its kind under the Compact, other Parties will likely look to the DNR's methods as a template for subsequent exemption applications. Thus, the DNR has the potential to set the bar as to how water and water-dependent resources in the Basin are managed under the Compact. And, as the public trust analysis will necessarily be subsumed in the Compact analysis (or vice versa), the Regional Body may very well embrace Wisconsin's broad protections as the gold standard for diversion applications. However, if the Parties believe that the DNR (and thus Wisconsin generally) is not complying with the Compact standards for review, the Compact provides means by which Parties may seek redress, including hearings before the Council, judicial review, and civil actions to compel compliance with the Compact's requirements.[139]

However, the DNR is well situated to engage in the necessary analysis as it prepares to take up Waukesha' once-again-pending

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134. *See* CITY OF WAUKESHA, *supra* note 126, at 5-7 to 5-8; *see also id.* app. h.

135. *See* Letter from Jeff Scrima, Mayor, City of Waukesha, to Matthew J. Frank, Secretary, Wis. Dep't of Natural Res. (July 2, 2010), http://dnr.wi.gov/org/water/dwg/greatlakes/Waukesha/Letter_to_DNR_July_2_2010.pdf.

136. *See* Compact, *supra* note 4, § 4.5.1(e).

137. *See* 2010 WI App. 85, ¶¶ 25–27. *Contra* Donegan, *supra* note 96, at 485–89, 491–94.

138. Compact, *supra* note 4, §§ 4.7.2, 4.5.4.

139. *Id.* § 7.3.

application.[140] The DNR derives its administrative powers from the statutes and, especially with regard to the public trust, from the Wisconsin Constitution.[141] The DNR's derived powers are in turn embodied in the Wisconsin Administrative Code, which sets forth specific procedures by which the DNR is required to undertake various duties, including managing water withdrawals.[142] These powers have been broadly construed by Wisconsin courts many times over, illustrating significant deference to the agency's technical determinations where such deference is due.[143] And, though the DNR's powers and duties with regard to the Compact have not yet been broadly exercised, the regulatory structures are in place—or can be readily analogized from existing regulations—to undertake sufficiently thorough review for the purpose of granting or denying Waukesha's permit for a Lake Michigan diversion.[144] Because the DNR's powers to administer the public trust have been so broadly construed and given such deference, any denial of a diversion application under the Compact will necessarily implicate the scope of the DNR's powers as trustee of the state's waters.

IV. WILL DRINKING WATER BE "FOREVER FREE" UNDER

140. *See, e.g.*, Letter from Paul R. Ybarra, Waukesha Common Council President, to Matthew J. Frank, Secretary, Wis. Dep't of Natural Res. (July 27, 2010), http://www.dnr.state.wi.us/org/water/dwg/greatlakes/Waukesha/Ybarra_letter_7_27_10.pdf.

141. *See* WIS. CONST. art. IX, § 1; *see also* WIS. STAT. § 23.09, .11 (2009–2010) (establishing state purpose of protecting natural resources and vesting DNR with power to take necessary measure to do so); *id.* § 30.03(4) (outlining DNR powers to enforce statutory and public trust obligations relating to navigable waterways); *id.* § 281.11 (acknowledging DNR powers to effectuate state policy of protecting water resources); *id.* § 281.12 (granting DNR supervision and control over waters of the state); Lake Beulah Mgmt. Dist. v. Wis. Dep't Natural Res., 2010 WI App. 85, ¶ 30, 327 Wis. 2d 222, 787 N.W.2d 926 (2010).

142. *See, e.g.*, WIS. ADMIN. CODE NR ch. 142 (2010) (relating to withdrawals of waters of the state); WIS. ADMIN. CODE NR ch. 820 (2007) (relating to groundwater quantity protection).

143. *See, e.g.*, *Lake Beulah*, 2010 WI App. 85, ¶¶ 31, 39, 327 Wis. 2d 222, 787 N.W.2d 926 (stating that the court will defer to DNR's technical conclusions relating to water resource use where conclusions are demonstrably based on full information, but where scientific evidence suggests further investigation is necessary, DNR, is bound by the public trust doctrine to so investigate).

144. *See, e.g.* WIS. STAT. § 281.346 (giving detailed legislative directives relating to implementation of the Great Lakes Compact); WIS. ADMIN. CODE NR ch. 150 (2010) (Wisconsin Environmental Policy Act regulations); WIS. ADMIN. CODE NR ch. 142 (2010) (outlining analogous framework to that which will be necessary for review of Waukesha's application under the standards of the Compact); WIS. ADMIN. CODE NR ch. 820 (2007); *see also Lake Beulah*, 2010 WI App. 85 ¶¶ 18–19, 22, 25, 27, 327 Wis. 2d 222, 787 N.W.2d 926 (discussing the deference typically accorded to DNR decisions in the context of natural resource utilization determinations).

WISCONSIN'S PUBLIC TRUST DOCTRINE?

As discussed above, Wisconsin's public trust has historically been one of the more inclusive versions.[145] As the public's use of the waters of the state has expanded beyond use solely for navigation, so too has the common law understanding of the public trust doctrine. Thus, after courts recognized those uses incidental to navigation, such as hunting and fishing,[146] the doctrine was further interpreted to encompass the right to use waters for general recreation and for the enjoyment of scenic beauty.[147] Additionally, not only has the public interest in preventing pollution been codified in statute,[148] it has also been recognized as falling solidly within the scope of the public trust doctrine.[149]

Further, given the doctrine's essential role and its expansive historical application, there is not only precedent to support its broadest possible application,[150] but also, arguably, a need to recognize its further application to a protected right in drinking water. As the United States and countries throughout the world face looming water shortages,[151] the Wisconsin's public trust doctrine presents a means to guarantee to Wisconsin citizens ongoing access to a resource that has shaped the state's economy and culture, while also ensuring the continued protection of the health and welfare. Not only is such a purpose expressly embodied in the legislative grant of power to the DNR to protect natural resources,[152] but the spirit of the doctrine, as protecting all citizens' rights to enjoy the benefits of a water rich state, could include the right to utilize those waters for maintaining healthy drinking water supplies. Additionally, the guarantee of such a right could prove

145. *See, e.g.*, Wisconsin's Envtl. Decade, Inc. v. Dep't Natural Res., 85 Wis. 2d 518, 526, 271 N.W.2d 69, 72 (1978); *see also* Henquinet & Dobson, *supra* note 17, at 350–52.

146. *See* Diana Shooting Club v. Husting, 156 Wis. 261, 271–72, 145 N.W. 816, 820 (1914).

147. Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 511–12, 53 N.W.2d 514, 522–23 (1952).

148. *See, e.g.*, WIS. STAT. § 281.11 (providing statement of policy and purpose for the DNR's role in water resource management, including preventing pollution).

149. *See* Wisconsin's Envtl. Decade, Inc. v. Dep't of Natural Res., 85 Wis. 2d 518, 533–34, 271 N.W.2d 69, 76 (1978).

150. *See, e.g.*, *id.*; *see also* Lake Beulah Mgmt. Dist. v. Wis. Dep't Natural Res., 2010 WI App. 85, 327 Wis. 2d 222, 787 N.W.2d 926 (2010).

151. Press Release, United Nations News Centre, Majority of World Population Faces Water Shortages Unless Action Taken, Warns Migiro (Feb. 5, 2009), http://www.un.org/apps/news/story.asp?NewsID=29796&Cr=water&Cr1=agriculture; Press Release, Center for Biological Diversity, Study Shows Water Shortages in Southeast United States Are Due to Overpopulation, Likely to Be Repeated (Oct. 19, 2009), http://www.biologicaldiversity.org/news/press_releases/2009/water-shortage-10-19-2009.html.

152. *See, e.g.*, WIS. STAT. §§ 281.11, .12.

to be a huge boon for Wisconsin, as the state and its municipalities have been positioning themselves as a water-rich destination for both business and recreation interests.[153]

Whereas the current doctrine applies only to water in situ, an expansion of the doctrine would require that all Wisconsin citizens have a right to access the waters of the state for drinking, just like all citizens have protected rights in the use and enjoyment of water resources for commerce, recreation, and natural beauty.[154] Therefore, if the doctrine's broader application was to be recognized, the DNR would be required to consider the contention that citizens of Waukesha, as beneficiaries to the public trust of waters in Lake Michigan, have a protected right to all uses of those waters, limited only by the purposes of the trust.[155]

Precedent from other jurisdictions directly demonstrates the feasibility of applying the doctrine to drinking water resources.[156] In *Robinson v. Ariyoshi*, the Supreme Court of Hawaii recognized the application of a public trust doctrine similar to conceptions of water rights as they had been traditionally applied under the Hawaiian monarchical system, prior to statehood.[157] In *Robinson*, the basis of

153. *See, e.g.*, Milwaukee Water Council, http://www.milwaukee7-watercouncil.org/wiki/show/Main (last visited Dec. 29, 2010). As a brief aside, it is necessary to acknowledge that finding a protected right to drinking water would likely have substantial implications within our federalist system. The federal government's Commerce Clause powers definitely reach the navigable waters of the Basin as well as extend to groundwater, which the Court has held to be a commodity subject to federal regulation. *See* Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 451–52 (2006). This potential control over the navigable waters has been referred to as the "navigational servitude." *See generally* Benjamin Longstreth, Note, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and Its Origins in State Public Trust Doctrine*, 102 COLUM. L. REV. 471 (2002). Accordingly, a federal court may invalidate a holding that Wisconsin's public trust includes drinking water, which is reasonably viewed as a commodity. Further, recognition of a protected right to drinking water could potentially infringe of the privileges and immunities of non-state citizens, which would in turn implicate an analysis of whether access to drinking water is a right that is fundamental. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 218–22 (1984).

154. *See* Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 511–12, 53 N.W.2d 514, 522–23 (1952).

155. *See, e.g.*, R.W. Docks & Slips v. State, 2001 WI 73, ¶¶ 18–23, 244 Wis. 2d 497, 628 N.W.2d 781 (discussing public purposes and legislature's goals in administering public rights).

156. *See, e.g.*, Robinson v. Ariyoshi, 658 P.2d 287, 310 (Haw. 1982); *In re* Water Use Permit Applications, 9 P.3d 409, 447, 449 (Haw. 2000) (holding that "the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction" and emphasizing protection of drinking water as "among the highest uses of water resources"); Mayor of Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760, 765 (N.J. Super. Ct. Law Div. 1987) (holding that the public trust doctrine applies to the state's control of drinking water reserves), *aff'd*, 557 A.2d 299 (N.J. 1989).

157. *Robinson*, 658 P.2d at 310.

Hawaii's water law in the traditional practices of resource protection was held to provide that the State maintained control of water resources for the beneficial use of the people, which traditionally had included the right to pure drinking water.[158] Additionally, in *Mayor and Municipal Council of Clifton v. Passaic Valley Water Commission*, a New Jersey court recognized the application of the public trust doctrine to drinking water, holding that the state legislature could not abrogate its duty to ensure public access to drinking water by allowing a water commission to maintain complete control over water resources to the public's detriment.[159]

While not binding in Wisconsin, these cases illustrate that the public trust doctrine can be justifiably applied beyond those uses of public waterways previously enunciated. However, Wisconsin's rich public trust jurisprudence provides its own suggestions that the doctrine could reasonably encompass claimed rights to unhindered access to water for municipal purposes such as drinking. The most recent pronouncement of the doctrine's scope in *Lake Beulah* maintains that public trust protections do apply to waters that are not within the traditional "navigable" definition.[160] That court acknowledged that comprehensive management of the state's water resources required a public trust analysis whenever a decision implicated waters hydrologically connected to navigable sources.[161]

Moreover, Wisconsin cases have long maintained that the scope of the public trust is to be "broadly and beneficially construed."[162] In line with the rationale of these precedents, Waukesha could analogize the right to access the waters of the state for drinking as falling within the public trust. For example, in *Priewe v. Wisconsin State Land & Improvement Co.*, the court held that the legislature was not free to grant trust lands to a private individual for localized private benefit, even where such use was purportedly in furtherance of the local public good. Instead, the legislature, the court held, was bound to maintain the waters and the lands beneath for the benefit of all the state's citizens.[163] Accordingly, Waukesha could argue that the water resources of Lake Michigan are such that management for the benefit of all the state's

158. *Id.* at 310–11.

159. 539 A.2d at 766–67.

160. *See* Lake Beulah Mgmt. Dist. v. Wis. Dep't Natural Res., 2010 WI App. 85, ¶ 25–27, 327 Wis. 2d 222, 787 N.W.2d 926 (2010).

161. *See id.*

162. *See* R.W. Docks & Slips v. State, 2001 WI 73, ¶ 73, 244 Wis. 2d 497, 628 N.W.2d 781 (citing Diana Shooting Club v. Husting, 156 Wis. 261, 271–72, 145 N.W. 816, 820 (1914)).

163. 103 Wis. 537, 548–53, 79 N.W. 780, 782 (1899).

citizens includes Waukesha's right to use the waters for drinking, provided that it return the waters and generally protect their ongoing health and integrity. Under *Priewe*, the state can no more forbid Waukesha's sustainable use of the waters than can it grant Milwaukee an exclusive right to use those waters for its local benefit and pecuniary gain.

Similarly, under *Muench v. Public Service Commission*, the "barrier" disallowing Waukesha citizens the right to Lake Michigan water may be analogized to the dam attempted to be constructed over the Namekagon River.[164] Whereas Milwaukee and other municipalities riparian to Lake Michigan may attempt to derive benefit from their use of the Lake to the exclusion of other citizens' uses, the state must intervene on behalf of those other citizens whose rights of use may be impeded by such exclusion. Thus, just as a hydroelectric dam to provide local power may impinge on the public trust, so too may a municipality's exclusive use of delegated rights to the use of Lake Michigan. Milwaukee and other lakeside cities hold their riparian right to drink from Lake Michigan subject always to the public trust,[165] which would provide that Waukesha may justifiably expect such equal rights.

Waukesha could further argue that the purpose of the public trust is—and surely has always been—so beneficient that it must encompass the right to preserve the citizens' health and welfare, in light of otherwise polluted drinking water resources. Under the reasoning of the court in *Diana Shooting Club v. Husting*, the waters must "inure to the benefit of the public" and as such "full and free use of public waters cannot be questioned,"[166] public benefit must encompass a City's use to maintain its residents' health through clean drinking water. Just as the court in *Diana* upheld the public right to use the waters for hunting, the right to use the waters for drinking would seem indistinguishable, in that the public purpose requires access to the waters for maintaining health and welfare. Such considerations of public health comports with the statutory authority delegated to the DNR in its role as the trustee for the state's natural resources.[167]

Thus, Waukesha could assert a claim that, under the public trust, it is entitled to take such benefits from the waters of the state that other citizens enjoy merely by virtue of their citizenship, i.e., clean public drinking water. Additionally, the riparian rights of reasonable use as

164. *See* 261 Wis. 492, 515, 53 N.W.2d 514, 524 (1952).

165. *See, e.g.*, *R.W. Docks*, 2001 WI 73, ¶¶ 23–24, 244 Wis. 2d 497, 628 N.W.2d 781.

166. 156 Wis. 261, 271 145 N.W. 816, 820 (1914).

167. *See, e.g.*, WIS. STAT. § 281.11 (2009–2010).

applied to taking water for drinking would not preclude a statewide right, as any riparian rights are held subject to the obligations of the public trust.[168] The City's assertion would, as with all public trust determinations, be weighed against other uses within the DNR's contemplation, such as ecosystem health, recreation, and navigation. And, of course, such an assertion would also necessarily implicate the Compact, which provides means by which the Parties may seek to enforce the Compact in the event another Party fails to uphold its obligations.[169]

Under the Compact, the Wisconsin DNR is required to determine whether Waukesha's application for a diversion meets the Compact's requirements for an out-of basin diversion.[170] Waukesha's preliminary draft application—or the DNR's initial reading of it—did not satisfy the preliminary requirements; Waukesha failed to demonstrate that there was no reasonable alternative to obtaining its water from Lake Michigan.[171] If the DNR would ultimately deny Waukesha's application, the Compact provides that an aggrieved party such as Waukesha may commence an action challenging the denial in a state administrative proceeding.[172] Though such review under the Compact would present an entirely new question of law, and may thus be subject to minimal deference on appeal,[173] the DNR is currently drafting administrative rules that will lend weight to a DNR decision under the terms of the Compact and its coordinate administrative rules.[174] Alternatively, a decision by the DNR couched in terms of its public trust responsibilities would likely be upheld as within the Department's particular expertise.[175]

But, if Waukesha couched *its* need for water in terms of the public

168. *See R.W. Docks*, 2001 WI 73, ¶¶ 18–24, 244 Wis. 2d 497, 628 N.W.2d 781.

169. Compact, *supra* note 4, § 7.3.

170. *See id.* § 4.3.1.

171. *See* Letter from Matthew J. Frank, *supra* note 108. *But see* CITY OF WAUKESHA, *supra* note 126, at 4-1 to 4-36 (describing four possible water supply alternatives and concluding that Lake Michigan water presents the only feasible alternative).

172. *See* Compact, *supra* note 4, § 7.3.1.

173. *See* Jicha v. DILHR, 169 Wis. 2d 284, 290–91, 485 N.W.2d 256, 258–59 (1992) (providing an analysis of three standards of review for agency decisions, including de novo review "where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented").

174. *See* Order of the State of Wisconsin Natural Resource Board, DG-24-10 (creating WIS. ADMIN. CODE NR ch. 852, Water Conservation and Water Use Efficiency), https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=7924 (last visited Dec. 29, 2010).

175. *See* Hilton *ex rel.* Pages Homeowners' Ass'n v. Dep't Natural Res., 2006 WI 84, ¶ 15, 293 Wis. 2d 1, 717 N.W.2d 166.

trust, the DNR's denial of Waukesha's application could be interpreted by a court as a violation of the DNR's fiduciary duty, and thus an invalid exercise of authority. Historically, claims that the DNR has abdicated its duty to reasonably manage trust property are not subject to the deference normally afforded department decisions.[176] Thus, a failure by the DNR to consider the implications of a broad public trust obligation as outlined above could subject its decision to invalidation on both Compact and public trust grounds.

Conversely, if Waukesha, or any of its residents,[177] brought a state-law claim against the DNR asserting the right of access to drinking water, a court would likely evaluate the City's plea in terms of Wisconsin's public trust law.[178] However, were Waukesha to succeed in its claim that it is entitled to Lake Michigan water by reason of its public trust rights, it would thus be provided a means of obtaining Basin water outside the scope of the Compact. Very likely, Wisconsin would be subject to suit for breach of the Compact, which clearly requires that states administer water resources to the benefit of the entire Basin.[179] Theoretically, in its administration of two distinct schemes intended to protect water resources, the DNR could be subject to conflicting duties under which one of the systems would have to give way. Such a situation involving competing state law claims and assertions of breach under the Compact would require protracted litigation to ascertain the rights of citizens, the duty of the state, and the rights of other states as Parties to the Compact.

However, it should also be noted that, notwithstanding any potential broadening of the public trust doctrine's application to include citizens' rights to drinking water, the doctrine would necessarily guarantee Waukesha a diversion of Lake Michigan water. The DNR might determine under the applicable administrative rules that, in light of the conflicting public interests in drinking water and preservation of water resources for other purposes, Waukesha's interest in obtaining drinking water from Lake Michigan is outweighed by other interests in maintaining water resources for other purposes. If the DNR made such

176. Scanlan, *supra* note 3, at 146–47 (discussing cases in which parties challenged the DNR's decisions to take actions that did not further public interests in trust resources); *see, e.g.*, Reuter v. Dep't of Natural Res., 43 Wis. 2d 272, 277–80, 168 N.W.2d 860, 861–63 (1969) (requiring particularized factual determinations by the DNR that a decision regarding public trust resources does not injure trust resources).

177. *See, e.g.*, WIS. STAT. § 281.31(10) (2009–2010) (stating that individuals aggrieved by agency action may seek administrative and judicial review thereof).

178. *See* WIS. STAT. § 281.346(2)(g); Compact, *supra* note 4, § 8.1.2.

179. *See* Compact, *supra* note 4, § 4.3.1.

a determination under the pending administrative rules, Waukesha residents would have very little on which to base review of a claim that they were entitled to drinking water from Lake Michigan, provided that the Department could show a reasonable basis for its decision.[180]

Frankly, though, the above-described impasse between local, state, and regional interests is not likely to arise, given the detailed statutory and administrative framework outlining the DNR's responsibilities under the Compact and the concordance between the intended scope of the Compact and the current scope of the public trust in Wisconsin. Accordingly, a court faced with the prospect of finding a protected right to drinking water under the public trust doctrine need not stretch the doctrine so far.

With regard to the DNR's statutory authority to implement the Compact, Wisconsin Statutes § 281.346 directs the Department to implement rules to effectuate the goals and requirements of the Compact in Wisconsin.[181] Because the Compact has ostensibly introduced new criteria by which the DNR will have to evaluate decisions relating to the waters of the state, there is a presumptive need to establish new rules by which such evaluation is undertaken.[182] Currently, the DNR is in the process of drafting such administrative rules.[183] Upon final implementation, these rules will provide the precise standards by which the Department will analyze technical requirements under the Compact, and will provide for greater deference to agency determinations in the administrative review process.[184] Further, the

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180. *See* Hixon v. Pub. Serv. Comm'n, 32 Wis. 2d 608, 629–32, 146 N.W.2d 577, 587–89 (1966) (holding that DNR predecessor Public Service Commission's denial of a breakwater permit was subject to deference due to the Commission's role as protector of natural resources).

181. *See, e.g.*, WIS. STAT. § 281.346(4)(g) (directing DNR to set standards to implement Exception Standard).

182. *Compare* WIS. STAT. § 281.346(4)(g) (mandating DNR rulemaking for Great Lakes Compact provisions), *with* § 227.11(2) (conferring rule-making authority on agencies to carry out the legislative purposes of those statutes with which the agency is charged with managing).

183. *See* Wisconsin Department of Natural Resources, Water Use Rules, http://dnr.wi.gov/org/water/dwg/greatlakes/rules.html (last visited Dec. 29, 2010).

184. *See* UFE Inc. v. Labor & Indus. Review Comm'n, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). The court set out requirements for agency decisions to receive "great weight," rather than "due weight" or de novo, deference:

> 1) the agency was charged by the legislature with the duty of administering the statute; 2) that the interpretation of the agency is one of long-standing; 3) *that the agency employed its expertise or specialized knowledge in forming the interpretation*; and 4) that the agency's interpretation will provide uniformity and consistency in the application

DNR's rulemaking endeavor comports with the unique, multi-jurisdictional nature of the Compact and will provide other states with needed affirmation of Wisconsin's commitment to water resource protection.[185] As Waukesha's inevitable final application undergoes Regional Review, then, those states will be more likely to affirm the DNR's position, which will likely be to grant Waukesha a diversion of Lake Michigan water.

And, all this water management can occur without expansion of the public trust doctrine beyond the original purpose of ensuring citizens' access to water, *in situ*. As highlighted above, Wisconsin and extra-jurisdictional precedent potentially support the assertion that drinking is a protected use of the state's water resources. However, the baggage accompanying such a conclusion would be tremendous, and a judicial decision so concluding would likely be viewed as a severe usurpation of authority to define the scope of public trust resources and uses.

While the scope of the doctrine in Wisconsin is surely broader than some may prefer, the legislature's continued enactment and reaffirmation of natural resource protection laws illustrates the state's unwavering commitment to conservation.[186] The *Lake Beulah* case serves as a prime example of statutory construction influenced by established scientific principles relating to natural resources. In construing the legislature's broad purpose of "protect[ing], maintain[ing] and improv[ing] the quality and management of the waters of the state, ground and surface, public and private,"[187] the court infused the public trust doctrine with the contemporary understanding that protecting and managing navigable waters is intimately related to doing so for groundwater as well.[188]

Moreover, confining the public trust doctrine to its established stated purposes avoids concerns that would accompany a holding that

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of the statute.

Id. (quoting Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995)) (emphasis added).

185. *See* Compact, *supra* note 4, § 4.3.1–.3.

186. The Compact itself provides a shining example of Wisconsin's dedication to protecting its resources, as do the DNR's continuously expanding administrative rules involving management of public trust resources. *See, e.g.*, Order of the State of Wisconsin Natural Resource Board, *supra* note 174.

187. *See* Lake Beulah Mgmt. Dist. v. Wis. Dep't Natural Res., 2010 WI App. 85, ¶ 18, 327 Wis. 2d 222, 787 N.W.2d 926 (2010) (quoting WIS. STAT. § 281.11 (2009–2010)) (interpreting DNR's duties under WIS. STAT. §§ 281.01(18), .11).

188. *See, e.g.*, Wisconsin Department of Natural Resources, Water Quality and Contamination in Private Wells, http://dnr.wi.gov/org/water/dwg/priweltp.htm (last visited Dec. 29, 2010).

Waukesha's citizens are entitled to unfettered access to the state's waters to satisfy their drinking water needs. Primarily, the history of the doctrine does not support the notion that any use of water should be unfettered; the public's right to use the water is always subject to the discretion of the legislature and the DNR. Any uses to which the public is entitled under the public trust are subject to a weighing of interests by the trustee.[189] And, as alluded to above, a judicial decision that would "find" an absolute right to drinking water anchored in the Wisconsin Constitution would surely be viewed as exceeding the province of the judiciary.

Finally, and most importantly, the Compact now encompasses the same protections as would any further recognition under the public trust doctrine. The Compact's fairly detailed standards (which will in turn be refined by the pending DNR rules) recognize that there will be situations in which a community near the Basin absolutely needs to tap the Basin's water resources. The Exception Standard and the proposed DNR rules are intended to require that such need is in fact absolute.[190] Hence, administration of the Compact will invoke weighing of interests similar to the DNR's administration of the public trust, but the existence of specific administrative rules will obviate the need for guesswork on the part of applicants, administrators, and judges. Waukesha will, in the end, receive Lake Michigan water for its municipal water supply, if it confirms that it has ruled out all other reasonable sources, and if its proposal meets the administrative standards to the satisfaction of the DNR and the Compact's Regional Body. Thus, even without finding a protected right in drinking water, Wisconsin's resource conservation laws will serve as a bastion of environmental protection.

V. CONCLUSION

On the precipice of drinking water shortages and expanding economic needs the world over, Wisconsin is poised to become a hub of international social, economic, and scientific activity based on water, and so the state has every reason to continue to take care of its waters. The continued vitality of the public trust doctrine, as recently illustrated in the *Lake Beulah* case, suggests one facet of Wisconsin's ongoing commitment to protecting the state's natural resources. Additionally, the state's and the Basin-region's adoption of the Great Lakes Compact

189. *See* Hilton *ex rel.* Page's Homeowners' Ass'n v. Dep't Natural Res., 2006 WI 84, ¶ 35, 293 Wis. 2d 1, 717 N.W.2d 166.

190. *See* Compact, *supra* note 4, § 4.9.4; Order of the State of Wisconsin Natural Resource Board, *supra* note 174.

further highlight the broad support for large scale conservation. And, most recently, the DNR's involvement in administrative rulemaking under the Compact and the Department's initial skepticism of Waukesha's preliminary diversion application serve as reminders of the ongoing processes of resource protection in action.

But while the state continuously develops its resource protection laws, resource-hungry parties such as Waukesha are left to wend their way through often vast administrative processes to gain access to seemingly basic resources. The Great Lakes Compact, as one of these administrative processes, is intended to fervently protect the Basin's water resources, while also allowing parties truly in need access to those resources. But the process is slow, expensive, and divisive. Thus, Waukesha may desire to seek access to drinking water elsewise, i.e., by persuading a Wisconsin judge that the state's public trust entitles residents of the city to water by virtue of their status as state citizens who hold established rights in free access to the state's waters.

However, Wisconsin's public trust doctrine has not yet been expanded to encompass a protected right in water for drinking. But as the doctrine's evolution illustrates, many uses of water beyond mere navigation have been recognized as protected under the trust. It could be argued that from those broadly defined uses, a right to broad access to the waters for drinking could be recognized.

In contrast, one may argue that Waukesha can no more maintain a claim that it is entitled to Lake Michigan water under the public trust than can any other citizen assert that he or she holds an inviolable right to exclude others from other protected uses of the waters. Such an argument posits that the right to take water for drinking is entirely distinguishable from the right to simply enjoy the water in place. One involves a commodity, and the other a right to enjoy the natural good of the state.

However, the nature of water as a resource and as a commodity defies such blanket statements. To use a particular area of water for maneuvering a giant barge, for example, necessarily excludes others from using that specific water for nearly any other purpose. The same holds true for each of the recognized uses of water under the public trust doctrine; even enjoyment of scenic beauty can be said to *require* the exclusion of others, as mass use of a scenic waterway will destroy the view. The difficulty in reconciling these concepts belies the simplicity of the public trust.

Foundational to Wisconsin's public trust doctrine, and absolutely necessary to its interpretation is the notion that "the *waters* . . . shall

be . . . forever free," not that "water" should be free. The doctrine, as embodied in the state constitution, was not intended to protect the right to take away drinking water any more than it was intended to protect the right to add sugar and carbonation and call the water a commodity. Instead, the doctrine of the public trust embodies a conviction held by the state's citizens and a policy enacted by the legislature that access to natural places like lakes and rivers is fundamental to the ongoing vitality of the state and her citizens. The doctrine is not about commodification, but preservation of those places and natural resources that should not be commodified.

In the end, Waukesha will get its water, once the city complies with the DNR's requests for information, and once the DNR is satisfied that the city's application satisfies the Compact's Exception Standard and the administrative requirements that the DNR is drafting. The process will, very likely, continue to be expensive, divisive, and time-consuming, but, ultimately Waukesha will drink clean water and the waters of the state will remain forever free.

GABE JOHNSON-KARP*

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